IN THE

Supreme Court of the United States

OCTOBER TERM—1950

No. 542

HARRY MINKOFF and BERNARD BORUCK,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

(Italics Ours)

There are a few statements in the Government's brief which we feel should be discussed.

It is said (p. 4) that a number of cartons

> "were shipped from Maiden, North Carolina, and received at the Whisenant Transfer Company in New York City on April 26, 1946 * * * "

and that

> "When the shipment was checked against the freight bills, no shortages were noted upon the truck manifest."

Continuing, the brief states that on April 27, 1946, Cordo, DiPinto and Lief

> "stole approximately 20 cartons of *this* shipment from the Whisenant Warehouse * * * "

The foregoing statements beg a fundamental question in the case.

That question is: is there any *proof* that the goods which Cordo, DiPinto and Lief stole from the Whisenant Warehouse on April 27, 1946 were part of the shipment which arrived here on April 26 from Maiden, North Carolina. It is highly significant that even the Government does not claim there is: the Government argues merely (brief p. 9) that the jury would have been justified in "*inferring*" such to have been the fact.

That we dispute.

The evidence on which the Government relies (brief pp. 8-9), i.e., Leeds' statement that he knew "exactly what was missing" supports no such inference. All Leeds said is that when, on April 29th, two days *after* the burglary, he checked the goods in the warehouse against the invoice which accompanied a shipment received here on the 26th, the day *before* the burglary, he did not find all the cartons listed on the invoice. But neither Leeds nor any other witness testified that he made a comparison of the goods with the invoice at the time of the receipt of the shipment on the 26th, or that on such a comparison he found in the shipment all the cartons listed on the invoice; indeed, neither Leeds nor any one else testified that he made a comparison of the goods in the warehouse with the cartons listed on the invoice at any time prior to the 29th, which two days was *after* the burglary.

The fact that, following a burglary, there were not found in the warehouse all the cartons listed on an invoice which accompanied a shipment received prior to the burglary does not prove, or justify an "inference," that what was

stolen was part of that shipment, particularly in the absence of proof that the cartons not found after the burglary had been received in that shipment and were in the warehouse up to the time of the burglary.

The Government is not correct when it says (brief p. 8), that prior to the burglary Leeds had seen the markings

> "on the cartons later found missing, including the marks of the North Carolina consignors and the names and addresses of the New York City consignees * * * "

All Leeds said is that the cartons which he saw on Saturday —before the burglary—had markings like the ones he saw on the cartons which were there on Monday. But nowhere did he, or anyone else, say that any of the cartons which he saw on Saturday were not there on Monday. *Non constat,* the cartons he saw on Monday were the same, and only the same, ones that he had seen on Saturday.

Thus there is no proof, and no basis for an "inference", that the stolen goods were part of an interstate shipment.

The point we urge was not raised in the *Smolin* case, the Government's statement (p. 8) to the contrary notwithstanding. Ours is not a case in which reliance is put on a claim that the goods which the thieves had with them may not have been the goods which they stole from Whisenant; neither is this a case, as was the *Smolin* case, in which defendants destroyed the wrappers to expunge evidence of their guilty knowledge of the origin of the goods. Indeed there is no evidence these defendants ever knew what markings were on the cartons here involved.

It is said (Government's brief, pp. 11-12) that petitioners had

> "constructive possession of the goods so long as the stolen goods were in the trailer"

because Bernard Boruck, on Minkoff's importunity, had "provided" the trailer and "consented" to its use by the thieves.

True, Boruck told the thieves where the empty trailer was. However, the trailer did not belong to any of the Borucks. It belonged to United Trucking Corporation, a corporation in which the Borucks had no interest. They never garaged the trailer or drove it; they never had control of it, or dominion over it.

In these circumstances, we submit, Boruck's disclosure to the thieves of the location of the empty trailer did not make petitioners guilty of "possession" of the goods which the thieves deposited therein.

The submission to the jury, during their deliberations, of the whole of Boruck's statement—including the part which had not been introduced into evidence and had not been read to the jury during the trial—is attempted to be justified in one place (brief p. 3) on the ground that, during his cross examination, Boruck gave testimony to the same effect as the matter set forth in the portion which was not introduced, and in another place (p. 16) on the ground that this portion of the statement affected Boruck's "credibility". If, as the Government states, Boruck's testimony was not inconsistent with the portion of the statement in question, that would make it *inadmissible*. But whether on this, or any other ground, it might have been admissible, the fact remains that it was not offered or received in evi-

dence, and not having been admitted, it was improper to send it to the jury for their consideration during their deliberations.

Insofar as the other points raised by us are concerned, we find in the Government's brief nothing which requires further discussion by us.

New York, March 23, 1951

Respectfully submitted,

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